Kentucky Law Journal

Volume 30 | Issue 4 Article 10

1942

Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender in Kentucky

Henry Howe Bramblet
University of Kentucky

defendant.[14] The author illustrates that, if the evidence does not fall within certain accepted categories under the present majority rule which he denominates the "spurious rule", it is excluded for lack of a category or "pigeon hole" in which to place it along with other like evidence. It is shown that in many cases the use of the spurious rule makes no difference in the actual decision, since the evidence easily falls within a well defined exception. The "spurious rule," however, adds another burden not to be found in the original rule, which is that of specifically placing the evidence within a particular exception. A court which follows the original rule has only one problem to face: Is the evidence relevant for any other purpose than to show an evil disposition? They are not bothered with finding a particular exception under which to admit the evidence.

It is submitted that the problem of the courts would be less burdensome if they reverted to the original rule and stated unequivocally that evidence of other crimes is admissible if it tends to throw light upon the crime in question, but inadmissible if it tends to show only a bad disposition.

JOHN A. FULTON

REVOCATION OF OFFER FOR UNILATERAL CONTRACT; EFFECT OF PART PERFORMANCE OR TENDER IN KENTUCKY

Courts have encountered considerable difficulty when confronted with the problem of whether an offer to enter into a unilateral contract may be withdrawn before performance of the requested act is completed.

Since there is a well established rule that an offer may be revoked at any time before acceptance (in a unilateral contract the doing of the requested act), it logically follows that an offer to enter into a unilateral contract may be withdrawn before the act is completed.

However, the application of this strict rule often works a hardship on the offeree who is without remedy, unless the circumstances be such that his partial performance has enriched the offeror and thus entitles him to a remedy in quasi-contract. In numerous other cases where the offeree has suffered a detriment but where no corresponding benefit has been conferred upon the offeror no remedy is available.[1] Some courts still reach this harsh result[2] but in order

[14] Stone, *The Rule of Exclusion of Similar Fact Evidence: England,* (1933) 46 Harv. L. Rev. 954; Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* (1938) 51 Hav. L. Rev. 988.

[1] But see the opposite view expressed by Worsmer, *The True Conception of Unilateral Contracts,* (1916) 26 Yale L. J. 136, 142, where the author goes to great length to state that he can see no injustice in the operation of the doctrine of unilateral contracts.

[2] Alexander Hamilton Institute v. Jones, 234 Ill. App. 444 (1924); Smith v. Cauthen, 98 Miss. 746, 54 So. 844 (1911) Kolb v. Bennett Land Co., 74 Miss. 567, 21 So. 233 (1897); Biggers v. Owen, 79 Ga. 658, 5 S.E. 193 (1888). Compare Post v. Frank, 75 N.Y. Misc. 130, 132 N.Y. Supp. 807 (1912).

to prevent such injustice many courts have resorted to false types of reasoning.

Possibly the weakest theory and the one followed by the fewest number of courts allows the offeree to recover damages in an action based on fraud or deceit.[3] The basis of fraud or deceit is the misrepresentation of a fact. Recovery in such an action must be based on the false assumption that the offeror, at the time the offer was made, intended to revoke it before it could be accepted. The same criticism may also be directed to a recovery based on the doctrine of estoppel which has been applied by a few courts.[4]

The other commonly used explanations are referred to as the unilateral and the bilateral contract theories. Some courts,[5] and the Restatement of Contracts[6] adopt the former theory and say that a contract is formed when performance is *begun* by the offeree and that subsequent withdrawal by the offeror is precluded. The fallacy of this reasoning is apparent when it is recalled that the acceptance requested by the offeror was a total, completed act and not the beginning of performance.

Courts adopting the bilateral theory have implied a promise on the part of the offeree to continue performance once begun.[7] Two fallacies are inherent in such a rationalization. First, the offeror did not ask for a promise and, secondly, no promise was given. If the bilateral theory be followed to its logical conclusion, the offeror must be allowed to sue for a breach of contract if the

[3] 1 Williston, *Contracts*, (1926), sec. 60a.

[4] Ashley, *Offers Calling for a Consideration other Than a Counter Promise*, (1909) 23 Harv. L. Rev. 159; Notes (1938) 17 Texas L. Rev. 208, (1928) 13 Iowa L. Rev. 332, (1938) 115 A. L. R. 152.

[5] Brackenbury v. Hodgkin, 116 Me. 339, 102 Atl. 106 (1917); If a party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, First National Bank v. Watkins, 154 Mass. 385, 387, 28 N. E. 275 (1891); Louisville and Nashville Ry. v. Coyle, 123 Ky. 854, 97 S. W. 772 (1906); see Ruess v. Baron, 10 P. (2d) 518, 519 (Cal. App., 1932).

[6] *Restatement, Contracts*, sec. 45 provides: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

[7] Boehm v. Spreckles, 183 Cal. 239, 191 Pac. 5 (1920); Los Angeles Traction Co. v. Wolshire, 135 Cal. 654, 67 Pac. 1068 (1902); Bloomenthal v. Goodal, 89 Cal. 251, 26 Pac. 906 (1891); Hayes v. Clark, 95 Conn. 510, 111 Atl. 781 (1920); Braniff v. Blair, 101 Kan. 117, 165 Pac. 816 (1917); Long v. Long, 23 La. 777, 49 So. 521 (1909); Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644 (1898); Little Rock Surgical Co. v. Bowers, 227 Mo. App. 649, 42 S. W. (2d) 367 (1931); Grossman v. Calonia Sand and Improvement Co., 103 N. J. L. 98, 134 Atl. 740 (1926); North Side News Co. v. Cypress, 76 Misc. 129, 132 N. Y. Supp. 806 (1912); Sec. 31 of the Restatement of Contracts suggests that in doubtful cases the contract should be construed as bilateral.

offeree refuses to complete the performance once begun. Clearly such a suit would be absurd.

The Kentucky Court of Appeals has not been consistent in the application of either the unilateral or the bilateral theory but apparently has seen fit to employ each of them at various times. In *Louisville & Nashville Ry. v. Coyle*,[8] the defendant's agent offered to take at a specified price "all the ties you put on at Gap within the next twelve months." In reliance thereon the plaintiff delivered a number of ties which were accepted and paid for by the agent who thereafter refused to accept any more. In allowing a recovery the court seemingly applied the unilateral theory when it said:

> "Where the performance of a contract is not compulsory on one party and he has an election to perform or not as he chooses, and he elects to perform his part of the contract and the other party accepts his election, the want of mutuality is thereby eliminated and he may then have a specific performance although no cause of action would originally lie for a breach of performance.'"[9]

In *Ayer & Lord Tie Co.* v. *O. T. O'Bannon*,[10] the defendant agreed to receive and buy for a specified price all the railroad cross ties the plaintiff would deliver in a specified time. The defendant after receiving a certain number of ties refused to accept any more. Although reversing the judgment for the plaintiff on other grounds, the court stated that there was a duty on the plaintiff to exercise reasonable diligence in delivering all the ties which he could and a corresponding duty on the defendant to receive and pay for all of the ties delivered in accordance with the terms of the agreement.

In *Ham v. Miss C. E. Mason's School*,[11] the defendant, in order to secure entrance for his daughter in plaintiff's boarding school, agreed to be responsible for a full year's tuition notwithstanding withdrawal or dismissal. The girl was withdrawn after a few months and plaintiff sought to recover the balance due on a year's tuition. In allowing a recovery the court clearly applied the bilateral theory when it said:

> "The offer contemplated a bilateral contract . . . the plaintiff reserved a place for the young lady and she entered the school and attended it for four months. The offer or proposal was thereby accepted and the contract partially performed. . . . The subsequent action and course of performance ripened the unilateral contract into a binding and enforceable obligation. . . . There was an implied promise to continue the school once begun. . . ."[12]

It is apparent that none of the theories satisfactorily provide a solution which, while administering justice, is at the same time free from illogical reasoning and is not in conflict with other well settled

---

[8] 123 Ky. 854, 97 S. W. 772, 8 L. R. A. (n. s.) 433 (1906).
[9] *Id.*, at 857, 97 S. W. at 773.
[10] 164 Ky. 34, 174 S. W. 783 (1915).
[11] 249 Ky. 478, 61 S. W. (2d) 7 (1933).
[12] *Id.*, at 481, 61 S. W. (2d) at 8.

rules of law. It is the writer's belief that a far better solution of the problem may be found in the application of an option theory.[13] Under this theory the offeror makes an implied collateral promise that if the offeree will begin performance the offer will not be withdrawn until there has been reasonable opportunity to complete the act. Such a construction has several advantages not found in theories now employed and is at the same time void of many of their fallacies. Of primary importance is the fact that it is in accordance with the understanding of the parties and secures for them their intended positions without working a hardship on either. Under this theory the offeror incurs no liability on his principal offer until the act is completed. On the other hand the offeree by beginning performance is not bound to continue but has merely accepted the collateral offer to hold the principal offer open.

The question remains: To what extent must the offeree have "gone forward" toward contemplated acceptance before the rule restraining a withdrawal can be invoked? It is generally held that mere preparation is not sufficient.[14] The Restatement of Contracts takes the view that *tender* is sufficient.[15] *Citizens National Life Ins. Co.* v. *Murphy*[16] would seem to indicate that tender is not sufficient in Kentucky but that the act must be actually begun. Here an application for insurance, signed by defendant, contained the statement that no contract for insurance should exist until the policy was actually delivered to the insured and the first premium paid. The policy was issued and tendered by plaintiff's agent to defendant who refused to except it. The court in holding that no liability for a premium existed stated:

> "When the plaintiff's agent tendered the policy to the defendant and he refused to accept it, he withdrew his offer; and his proposition was at an end."[17]

It is submitted that in such a situation tender of performance by the offeree should be deemed sufficient to bind the offeror. Here is a situation where good faith and diligence on the part of the offeree will avail him nothing since the offeror has made an offer which may not possibly be accepted without his full cooperation. In such a situation tender and the act of beginning performance are synonymous and to deny one is to deny the other. If the offeror is to be restrained from withdrawing once performance has begun, he

---

[13] McGovney, *Irrevocable Offers*, (1914) 27 Harv. L. Rev. 644, 659; Taylor, *Charitable Subscription Contracts and the Kentucky Law*, (1940) 29 Ky. L. J. 23, 25.

[14] Doten v. Chase, 237 Mass. 218, 129 N. E. 363 (1921); Cadigan v. Crabtree, 179 Mass. 474, 61 N. E. 37 (1901); Pullen v. Bennett Land Co., 74 Miss. 567, 21 So. 233 (1897); Flinders v. Hunter, 60 Utah 314, 208 Pac. 526 (1922); *Restatement, Contracts, loc. cit. supra* note 6.

[15] *Restatement, Contracts, loc. cit. supra* note 6.

[16] 154 Ky. 88, 156 S. W. 1069 (1913).

[17] *Id.* at 92, 156 S. W. at 1071.

should also, in the class of cases under discussion, be restrained to deny the offeree the means to begin performance.

In an effort to achieve justice, substitute logical analysis and clarity of thought for false reasoning and resultant ambiguity, and to attain for the parties the relative positions which they intended to occupy, the writer submits that the Kentucky courts should apply the option theory to unilateral contracts and adopt the Restatement of Contracts view that tender of performance is sufficient to bind the offeror.

HENRY HOWE BRAMBLET